

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

74-2466

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
No. 74-2466

JOSE BORRELLO,

Plaintiff-Appellee,

—against—

PERERA COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT

GREENWALD, KOVNER & GOLDSMITH
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of Counsel



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POINT I

The District Court incorrectly held that defendant's misapplication of funds was the proximate cause of the loss and erroneously refused on that ground to apply the doctrine of equitable estoppel.

Plaintiff's brief is primarily devoted to establishing points of law not in issue.

The opening sentence of defendant's argument on page 8 of its brief reads:

"Defendant conceded in the District Court and concedes here its responsibility for a misapplication of the plaintiff's funds on September 23, 1971."

The question before the Court is basically this: Is defendant's careless misapplication of the plaintiff's funds on September 23, 1971 equivalent to an attainder so profound and far-reaching that the subsequent intervening conduct of the plaintiff, indisputably the proximate cause of the loss, is to be ignored?

On page 10 of defendant's brief, the general proposition is quoted from *Bouvier's Law Dictionary* to the effect that "The proximate cause is that which is nearest in the order of responsible causation". If plaintiff quarrels with this proposition, he has not said so. Tested by that proposition, the defendant was not, and the plaintiff was, the proximate cause of the loss.

The argument is made that defendant is not an "innocent" or a "commercially innocent" party because it misapplied funds on September 23, 1971. There is no suggestion, indeed there can be none, that plaintiff was thereby damaged. The test for negligence is whether injury is coupled with resulting damage. On that day there was none, *In re McCafferty's Will*, 147 Misc. 179, 262 N.Y.S. 38.

In a footnote on page 29 of plaintiff's brief, the Marfinco account with defendant is described as "widely fluctuating". Whether this is intended as a concession or an argument is not readily apparent. Plaintiff has admitted that by November 1, 1971 his October bank statement was in his hands together with the two cancelled checks which he issued to defendant, that he then read the legends on the backs of both checks "For deposit only—Pay to the credit of Marfinco S.A." and that Marfinco was a firm of which he had never heard. Plaintiff's exhibit 15, 98a, shows the "widely fluctuating" credit balances of Marfinco S.A. with

defendant. It shows further that, for the ensuing two months and twenty-four days, the credit balances are conclusive on the matter of causation by plaintiff.

<i>Date</i>	<i>Marfinco S.A. Credit Balance</i>
November 1, 1971	\$185,549.32
November 3, 1971	81,696.45
November 9, 1971	148,853.76
November 15, 1971	90,362.56
November 18, 1971	21,325.57
December 1, 1971	133,820.18
December 3, 1971	27,135.43
December 10, 1971	138,829.34
December 17, 1971	9,615.40
December 31, 1971	114,643.58
January 4, 1972	13,002.67
January 11, 1972	85,940.00
January 17, 1972	77,736.77
January 24, 1972	116,262.44

Certainly there was "fluctuation", but during that entire period of two months and twenty-four days, defendant had within its control Marfinco funds five times, even nine times in excess of the \$20,000.00 involved in this suit and therefore the plaintiff would have been made whole in response to a telephone call, cable or an airmail letter. The failure to initiate a communication is both the sufficient and the producing cause of the loss. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339.

What plaintiff here seeks is a reward at the expense of the defendant for his own benighted conduct, immunity from his error of omission, punishment for defen-

dant's error of commission. The purpose underlying the doctrine of equitable estoppel is to prevent assertion of that position.

Plaintiff has attempted to distinguish *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 1972, 31 N.Y.2d 223 on the ground that it involved cashier's checks rather than certified checks. Concededly, that is an issue which appeared to divide the majority and the minority in the New York Court of Appeals. The case at Bar involves neither cashier's checks nor certified checks. *Bunge*, as well as other cases relied upon by defendant, was cited for two propositions, namely, that the dishonesty of plaintiff's broker is imputable to plaintiff and that equitable estoppel requires the loss to be borne by him who can

Plaintiff's discussion of *Federal Savings & Loan Insurance Corp. v. Kearney Trust Co.*, 151 F.2d 720 (8th Cir. 1945) is based upon a highly selective presentation of the facts and is misleading. In that case, the endorsements on the checks, like those in the case at Bar, clearly put the drawer on notice of a misapplication. Plaintiff says that the defense of equitable estoppel was nevertheless rejected.

Examination of the facts in that case establishes that the original owner of the claim, a Savings & Loan Association, was operated by two employees, its President, Harold Wilson, who was the embezzler and his sister-in-law, Aileen Chrisman, who was the Secretary of the Association and who asked no questions about the decisions of the President. We quote from the decision so as to leave no doubt on this point.

"During the time these transactions occurred, and for several years prior thereto, one Harold Wilson was president of the Loan Association and his sister-in-law

Aileen Chrisman was its secretary. They were the only employees in charge of the business of the association and each had authority to draw checks on its funds." p. 721

"Chrisman testified that she did not know that the transactions were irregular; that when the statements came from the First National Bank Wilson always examined them and destroyed them, while the checks were placed in the files; that she never examined the checks nor noticed the stamp placed on the back of each of them by the defendant." p. 722

Clearly, had the checks bearing notice of a probable misapplication of funds reached the notice of any Loan Association official other than the embezzler and his unseeing and compliant sister-in-law, the doctrine of equitable estoppel would have defeated the claim there as it should here.

CONCLUSION

The judgment appealed from should be reversed and the complaint dismissed.

Respectfully submitted,

GREENWALD, KOVNER & GOLDSMITH
Attorneys for Defendant-Appellant

HARRY LITWIN
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----	X
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	:
Plaintiff-Appellee,	:
	:
-against-	:
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PERERA COMPANY, INC.,	:
	:
Defendant-Appellant.	:
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No. 74-2466

PROOF OF SERVICE

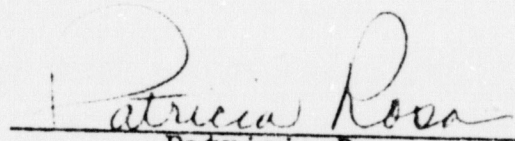
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PATRICIA ROSA, being duly sworn, deposes and says:

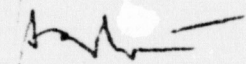
I am a secretary employed in the office of Greenwald,
Kovner & Goldsmith, attorneys for the defendant-appellant in
the above-entitled action.

On the 12th day of March, 1975 at 521 Fifth Avenue,
New York, New York, I served the reply brief in the captioned
appeal upon counsel for the plaintiff-appellee by depositing
in the post office box regularly maintained by the United
States government two copies thereof duly enclosed in a
sealed postpaid envelope directed as follows:

Lawrence W. Pollack, Esq.
Messrs. Migdal, Tenney, Glass
& Pollack
598 Madison Avenue
New York, New York 10022


Patricia Rosa

Sworn to before me this
12th day of March, 1975.


Notary Public

HARRY LITWIN
Notary Public, State of New York
No. 40,000,000, Qual. in Westchester Co.
Exp. 12/31/77
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STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within
has been compared by the undersigned with the original and
found to be a true and complete copy.

Dated:

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and
belief, and that as to those matters deponent believes it to be true.
Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
the corporation

of
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within attorney(s) for
upon in this action, at

the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within

upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

Please take notice that the within is a true copy of a

made and entered herein on the _____ day of _____, 19____ in the office of the clerk of _____

Dated, _____, 19____

Yours, etc.

GREENWALD, KOVNER & GOLDSMITH

Attorneys' for

Office and Post Office Address,

521 FIFTH AVENUE

NEW YORK, N. Y. 10017

To

Attorney for

SIR :

Please take notice that a proposed

of which the within is a true copy will be presented for settlement and entry herein to the Hon.

one of the judges of the within named Court
at

on the day of , 19

at . M.

Dated, N. Y., _____, 19____

Yours, etc.

GREENWALD, KOVNER & GOLDSMITH

Attorneys for

Office and Post Office Address,

521 FIFTH AVENUE

NEW YORK, N. Y. 10017

To

Attorney for

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ATTORNEYS FOR

Defendant-Appellant

OFFICE AND POST OFFICE ADDRESS

521 FIFTH AVENUE

NEW YORK, N. Y. 10017

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FOLD HERE

at.